Malayan Banking Bhd v Edaran Pit Stop Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D5-22-440 OF 1992
KAMALANATHAN RATNAM J
23 SEPTEMBER 1999

Civil Procedure *— Summary judgment — Guarantee — Construction of guarantee — Conclusive evidence clause — Plaintiff's right to vary interest — Whether plaintiff had to inform guarantor of changes in interest rates — Contracts Act 1950 s 86*

Civil Procedure *— Summary judgment — Guarantee — Whether settlement by other guarantor extinguishes plaintiff's claim*

The first defendant took some banking facilities from the plaintiff, which the fourth defendant stood as guarantor. The plaintiff's application for summary judgment on the sums due under the facilities was allowed. The fourth defendant appealed. It was contended that there were triable issues since no consent from the fourth defendant was obtained when the interest rates were varied; therefore, by virtue of s 86 of the Contracts Act 1950, the fourth defendant was discharged of his obligations under the guarantee. It was also contended that triable issues arose as to whether there was a settlement between the plaintiff and the first defendant as principal debtor, the terms of which discharged the fourth defendant, and as to whether the payment received by the second defendant, who also stood as guarantor to the first defendant, extinguished the plaintiff's claim.

Held, dismissing the appeal:

(1) The fourth defendant's liability arose under the guarantee document which the fourth defendant had agreed to pay on demand all monies due by the borrower including interest. As such, the final judgment entered against the first defendant formed the quantum of the defendant's liability as guarantor. Further, there existed a conclusive evidence clause and the letters of offer clearly reserved the plaintiff's right to vary the interest at their discretion without the requirement of having to give notice (see pp 329B–C, 330B–C); *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282 followed and *Credit Corp (M) Bhd v Lucky Heights Development Sdn Bhd* [1996] 4 MLJ 556 distinguished.

(2) Section 86 of the Contracts Act 1950 did not apply as an interpretation of cl 12 of the guarantee showed that the fourth defendant agreed that the plaintiff need not revert to him or to obtain his consent to enlarge or vary any credit and these words were wide enough to cover the situation where the plaintiff varies the interest rates imposed on the banking facilities given to the first defendant (see pp 330H–331A).

(3) On a construction of the clause relating to the continuation of the guarantee, the liability of the guarantor was clearly preserved whether or not there was another guarantee in respect of the debt (see p 331H–I).

(4) There was no settlement between the first defendant and the plaintiff as the former failed to effect payment on or before the deadline imposed. The second defendant's payment of RM200,000 did not extinguish the plaintiff's claim. The payment was received as part payment of the debt of the first defendant and the plaintiff agreed to the release of the second defendant's liability under the guarantee without prejudice to its rights (see p 332E–H).

[Bahasa Malaysia summary

Defendan pertama telah mengambil kemudahan perbankan daripada plaintif, di mana defendan keempat berperanan sebagai penjamin. Permohonan plaintif untuk penghakiman terus di atas jumlah yang terhutang di bawah kemudahan-kemudahan tersebut telah dibenarkan. Defendan keempat telah merayu. Adalah ditegaskan bahawa terdapat isu-isu yang boleh dibicarakan oleh kerana persetujuan daripada defendan keempat tidak diperolehi apabila kadar faedah diubah; oleh itu, menurut s 86 Akta Kontrak 1950, defendan keeempat telah dilepaskan daripada tanggungjawabnya di bawah jaminan tersebut. Ia juga ditegaskan bahwa isu-isu yang perlu dibicarakan berbangkit berkenaan dengan sama ada terdapat penyelesaian antara plaintif dan defendan pertama sebagai penghutang prinsipal, terma-terma di mana defendan keempat dilepaskan, dan sama ada bayaran yang diterima oleh defendan kedua, yang juga bertindak sebagai penjamin kepada defendan pertama, telah melenyapkan tuntutan plaintif.

Diputuskan, menolak rayuan tersebut:

(1) Liabiliti defendan keempat timbul di bawah dokumen gerenti di mana defendan keempat bersetuju untuk membayar apabila dituntut semua wang yang terhutang oleh peminjam termasuk faedah. Oleh itu, penghakiman muktamad yang dimasuki terhadap defendan pertama membentuk kuantum liabiliti defendan sebagai penjamin. Selanjutnya, wujud fasal keterangan yang konklusif dan surat tawaran dengan jelas menyimpan hak plaintif untuk mengubah faedah mengikut budi bicaranya taanpa keperluan memberikan notis (lihat ms 329B–C, 330B–C); *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282 diikut dan *Credit Corp (M) Bhd v Lucky Heights Development Sdn Bhd* [1996] 4 MLJ 556 dibezakan.

(2) Seksyen 86 Akta Kontrak 1950 tidak terpakai oleh kerana penafsiran fasal 12 gerenti tersebut menunjukkan bahawa

A defendan keempat bersetuju bahawa plaintif tidak perlu merujuk kepadanya atau mendapatkan kebenarannya untuk meninggikan atau mengubah sebarang kredit dan perkataan-perkataan ini adalah cukup luas untuk meliputi situasi di mana plaintif mengubah kadar faedah yang dikenakan atas kemudahan perbankan yang diberikan kepada defendan pertama (lihat B ms 330H–331A)

(3) Di atas penafsiran fasal berkenaan dengan penyambungan gerenti, liabiliti seorang penjamin adalah jelas dikekalkan tidak kira sama ada terdapat gerenti yang satu lagi berkenaan hutang tersebut (lihat ms 331H–I) .

C (4) Tiada penyeleaian antara defendan pertama dan plaintif oleh kerana defendan pertama gagal untuk membuat pembayaran pada atau sebelum had masa dikenakan. Pembayaran defendan kedua sebanyak RM200,000 tidak melenyapkan tuntutan plaintif. Bayaran telah diterima sebagai bayaran sebahagian D hutang defendan pertama dan plaintif bersetuju untuk melepaskan liabiliti defendan kedua di bawah gerenti tanpa memprejudiskan haknya (lihat ms 332E–H).]

Notes

E For cases on guarantee, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4548–4553.

Cases referred to

Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282 (folld)
F *Credit Corp (M) Bhd v Lucky Heights Development Sdn Bhd* [1996] 4 MLJ 556 (distd)
Dobbs v The National Bank of Australasia Ltd (1935) 53 CLR 643 (refd)
Herbert v R (1941) 64 CLR 461 (refd)

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Legislation referred to

Contracts Act 1950 s 86

JD Goonting (*ML Lum & Co*) for the appellant/fourth defendant.
H *ML Lau* (*Shook Lin & Bok*) for the respondent/plaintiff.

Cur Adv Vult

Kamalanathan Ratnam J:

I THE APPEAL

This is the fourth defendant's appeal against the decision of the learned senior assistant registrar given on 3 April 196 allowing with costs the

plaintiffs application for summary judgment for the sum of RM262,524.42 together with interest thereon at the rate of 3% above the base lending rate on monthly rests from 1 January 192 till the date of full payment and additional interest at the rate of 1% per annum on monthly rests on the total balance outstanding as at 1 January 1992 till the date of full payment and costs. On 14 August 1996, I dismissed the appeal with costs.

THE DELAY

At the outset, I must say that whilst I left the commercial division as of 31 December 1996 the first time I became aware of this appeal was on 11 August 1999 when I received a letter dated 9 April 1999 from the fourth defendant's solicitors.

It is important that counsel pursuing an appeal ascertain the correct court to which the letter ought to be sent. The appellant's solicitors who are from Kuala Lumpur ought to have known that I am no longer in the commercial division and that it is clearly not the duty of the present judge of D5 to write this judgment. Counsel's lackadaisical attitude has caused unnecessary delay in this matter.

FACTS

The plaintiff's claim against the fourth defendant is pursuant to a guarantee dated 19 October 1983 ('the guarantee') given to secure the grant of various banking facilities and in particular an overdraft facility ('overdraft facility') to the first defendant company, Edaran Pit Stop Sdn Bhd ('principal debtor'). The sums claimed by the plaintiff are in respect of amounts claimed to be due outstanding and payable by the principal debtor under the overdraft facility.

The agreement for the grant of the banking facilities between the plaintiff and the principal debtor arises from the plaintiffs letter of offer dated 17 May 1983 as varied from time to time by the plaintiffs letters of offer dated 8 July 1983, 13 October 1983, 28 March 1985, 12 March 1986 and 9 May 1988 respectively.

FINDINGS OF THE COURT

The fourth defendant contends that there are various triable issues.

Correctness of computation of interest

The fourth defendant submits that the liability of the fourth defendant as guarantor is only 'secondary' to the liability of the borrower. I do not understand what he means by stating that the guarantors liability is 'secondary' to the liability of the borrower.

On 19 August 1996, I delivered a judgment on this matter wherein I had already considered and decided in favour of the plaintiff and against the first defendant on the issue of whether the letters of offer allow for the computation of interest in the manner claimed. It would be totally

A inconsistent if I do not enter judgment for the same sum against the fourth defendant as guarantor.

In any event, I hold that the issue of the letters of offer is irrelevant to the fourth defendants liability to the plaintiff which arises from a guarantee dated 19 October 1983. In fact even the fourth defendant concedes to this in his submission when he said '... the fourth defendant's liability to the plaintiff must necessarily be measured against and dependent upon such sums that the plaintiff may properly and lawfully claim against the principal debtor.' Clearly, the fourth defendants liability arises under the guarantee document. Pursuant to the guarantee, the fourth defendant agreed, inter alia, to pay on demand all monies due by the borrower including interest. It is my judgment that the final judgment I had entered against the borrower on 19 August 1996 settles the quantum in respect of the fourth defendants liability as guarantor.

The conclusive evidence clause

Further, the guarantee contains a conclusive evidence clause. Clause 9 of the said guarantee states:

> A statement signed by your manager, sub-manager, secretary or any one of your officers as to the moneys and liabilities for the time being due or incurred to you from or by the customer shall be final and conclusive evidence against me/us for all purposes.

The plaintiff has already issued a statement as to the amount owing from the borrower and the said statement is shown as an exhibit in an affidavit affirmed on behalf of the plaintiff.

In *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282, the Federal Court said at p 284E–F as follows:

> In the present case, the guarantee contains a clause which enables the bank by producing a certificate of indebtedness by its officer to dispense with legal proof of the actual indebtedness of the respondents. Clause 19 provides thus 'A certificate by an officer of the bank as to the money and liabilities for the time being due or incurred to the bank from or by the customer shall be conclusive evidence in any legal proceedings against us or any one of us or our personal representatives.' It means that, for the purpose of fixing liability of the respondents, the company's indebtedness may be ascertained conclusively by a certificate ... .

I find that the conclusive evidence clause in the guarantee signed by the fourth defendant herein is similar to the clause discussed in *Citibank NA*. In the circumstances, I am bound by the said decision of the Federal Court which adopted the principle set out in *Dobbs v The National Bank of Australasia Ltd* (1935) 53 CLR 643. In the *Dobbs* case the High Court of Australia said at p 651 that:

> The clause means what it says, that a certificate of the balance due to the bank by the customer shall be conclusive evidence of his indebtedness to the bank.

Whilst I agree that there are numerous decisions regarding the conclusive evidence clause and that some have considered and upheld the view that the

court can look beyond the conclusive evidence clause, to ascertain the liability of the party to be bound by the clause, it is my judgment that each case has to be construed in the light of its own facts. In fact, the fourth defendant referred me to my own decision in *Credit Corp (M) Bhd v Lucky Heights Development Sdn Bhd* [1996] 4 MLJ 556 wherein I had held that no claimant should be allowed to hide behind a conclusive evidence clause and be allowed to make unlawful demands against its borrowers or guarantors. However, I must remind myself that in *Lucky Heights Development*, I had held that the claim against the borrower had not been established as there was an issue as to the variation of interest without notice. In the case before me the letters of offer clearly reserved to the plaintiff the right to vary interest at their discretion without the requirement of notice having to be given.

Discharge by variation of terms of agreement between principal debtor and creditor

No doubt as pointed out by the fourth defendant there have been variations of the interest rates. The fourth defendant seeks to emphasize that his consent was not obtained with regard to the variation of the interest rates. However, I note that in each and every letter of offer the plaintiff has expressly reserved its right to vary the interest imposed on the borrowers overdraft facility.

On this issue the fourth defendant has sought the protection of s 86 of the Contracts Act 1950 ('the Act'). The said section reads as follows:

> Discharge of surety by variance in terms of contract
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> Any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.

The fourth defendant thus argued that he has raised a triable issue as to whether the fourth defendant is discharged from his obligations under the guarantee by virtue of s 86 of the Act as there are variations on the terms of the agreement between the plaintiff and the first defendant, the borrower. However, a relevant cl 12 of the guarantee is reproduced and it reads as follows:

> I/We hereby agree that you shall be at liberty without any further consent from me/us and without thereby affecting my/our liability under this guarantee at any time to determine enlarge or vary any credit to the customer ... .

To my mind, the interpretation of this clause is purely a question of law and that it does not raise a triable issue. It is my judgment that by signing the guarantee containing the said cl 12, the fourth defendant had expressly agreed that the plaintiff need not revert to him nor obtain his consent to determine, enlarge or vary any credit. I interpret the words 'to determine' as giving the plaintiff the right to terminate the borrower's facilities. Similarly I interpret 'to enlarge' as giving the plaintiff the right to increase the credit of the borrower and needless to say that the guarantor's liability being limited always to the amount stated in the guarantee document. I also interpret 'to vary' as giving the right to the plaintiff to alter or change the

terms of the banking facilities given to the borrower. It is my judgment therefore that the words contained in cl 12 are wide enough to cover the situation where the plaintiff varies the interest rates imposed on the banking facilities given to the first defendant. I reject the fourth defendant's submission that the clause is only wide enough to cover variations on the 'credit limit' afforded to the borrower and not wide enough to include a variation in the interest imposed on the facility. It is my judgment that if the intention of the parties was as contended by the fourth defendant the words 'credit limit' and not 'credit' would have been used in the said clause. In fact the word 'credit' is defined in Stroud's *Judicial Dictionary of Words and Phrases* with a quote from McTiernan J in *Herbert v R* (1941) 64 CLR 461. It reads as follows:

> In commercial and financial affairs the word credit may signify the financial arrangement in a transaction or the reputation for solvency and honesty which entitles a person desirous of incurring a debt or liability to do so on the terms that payment is to be deferred. In its former meaning it includes the delivery of goods or the advancing of money with the trust that the debtor will have the means to pay and will pay at a future date ... .

It is my judgment that the word 'credit' in cl12 of the guarantee refers to the limit of the value of the banking facilities to be granted to the principal debtor be it for letters of credit, or trusts receipts or the overdraft facility.

Parties' intention to replace guarantee with new guarantee

The fourth defendant contends that upon the issuance by the plaintiff of the various letters of offer, the plaintiff had intended that the banking facilities as granted to the principal debtor, be secured by fresh guarantees in replacement of *the* guarantee (emphasis added). To my mind this is a futile presumption. If indeed there had been a second guarantee executed then I can see the relevance in seeing the various intentions given to both the guarantees. But in this case there is only one guarantee as the said guarantee has not been revoked and is expressly stated to be a continuing guarantee, which would not be prejudiced by any existing or future guarantees with respect to the same debt. The fourth defendant's attempt at ferreting out a guarantee from the existing letters of offer is, to put it plainly, an attempt to make something out of nothing. In fact cl 5 of the guarantee states as follows:

> This guarantee shall be without prejudice to and shall not be affected nor shall I/we or any of us be released or exonerated by any of the matters following:
>
> (i) any securities negotiable or otherwise including other guarantees which you may now or at any time hereafter hold from the customer or any other person or persons in respect of any money hereby guaranteed ... .

I hold without reservation that on the construction of the clause relating to the continuation of the guarantee and cl 5, as stated above, the liability of the guarantor is clearly preserved whether or not there is another guarantee in respect of the said debt.

Discharge by settlement

The fourth defendant also contends that there is a triable issue as to whether a settlement has been concluded between the plaintiff and the principal debtor, the terms of which have discharged the fourth defendant from all liabilities under the guarantee.

To my mind, an examination of the correspondence between the principal borrower and the plaintiff clearly shows that settlement was contemplated but was never concluded between the parties. There is only one letter which the plaintiff has written dated 8 January 1992 in reply to the fourth defendant's four letters and this letter expressly sets out the terms on which settlement was to have been effected. The plaintiff had stated in the said letter that its management had approved the first defendant's request for a further fourteen days extension of time to pay the settlement sum of RM200,000 together with monthly interest from April 1991 to December 1991 totalling RM22,026.94 and the legal fees of RM1,189 on or before 15 January 1992. It was thus expressly reserved in para 4 of the said letter that:

> Should we receive no cooperation from you, we may have to take legal action to recover the full amount owing against you and your guarantors.

In my view, this letter is explicit. Since the first defendant had failed to effect payment on or before the deadline of 15 January 1992, the 'settlement' was never effected.

To the fourth defendant's argument that it is a triable issue whether the payment of RM200,000 received from the second defendant extinguishes the claim of the plaintiff entirely, I find that the evidence shows that the proposed settlement was to have been between the first defendant and the plaintiff whereby payment was to have been effected by 15 January 1992. Since the letter dated 8 January 1992 from the plaintiff expressly reserved its right to proceed with recovery of the full amount due and owing in the event of a default, the plaintiff was entitled to proceed with recovery of the full amount owing (which added up to well over RM200,000) when the settlement fell through by reason of non-compliance, by the first defendant. I also note that when the second defendant subsequently made the payment of RM200,000, it was received by the plaintiff as part-payment of the debt owing under the first defendant's account. The plaintiff then agreed to release the second defendant from his liability under the guarantee without prejudice to its rights as against the other guarantors. It must be noted that cl 13 of the said guarantee clearly preserves the plaintiff's rights in this respect. Clause 13 reads as follows:

> You shall also be at liberty to release or discharge any of us from the obligations of this guarantee or to accept any composition from or make any other arrangements with any of us without thereby prejudicing or affecting your rights and remedies against the other or others of us.

In the circumstances it is my finding that there are no triable issues.

A *Introduction of new terms*

The fourth defendant argued that the plaintiff's letter dated 8 January 1992 had unilaterally introduced new terms after a concluded agreement between the plaintiff and the first defendant and that the original agreement did not make a provision for the payment of interest or revival of the plaintiff's
B original claims nor did the letter dated 8 January 1992 itself make an express provision as to the revival of the original cause of action. This cannot be so because there was never any concluded settlement between the first defendant and the plaintiff and that the first defendant had not met the terms and conditions for settlement set out by the plaintiff in its only letter dated 8 January 1992 in reply to the first defendant's earlier four letters. In
C the circumstances this argument must fail.

In my view, this was a proper case for summary judgment. I therefore dismissed the appeal with costs.

Appeal dismissed with costs.

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Reported by Chin En Tek

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